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No. 05-1623

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. TILTON, Secretary of the California Department of Corrections and Rehabilitation, *Petitioner*,

v.

BRIAN A. BUCKLEY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEITIONER'S REPLY MEMORANDUM

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QUESTIONS PRESENTED

Finding as a fact that the prisoner "well knew" his plea bargain called for a sentence of fifteen years to life imprisonment, the state court rejected his claim that the bargain called only for a maximum sentence of fifteen years instead. Without disturbing the state court's factual finding, the Ninth Circuit Court of Appeals ordered habeas corpus relief on grounds that California contract law required the state court to ignore the prisoner's actual understanding of the bargain.

The Questions Presented are:

1. Did "clearly established federal law" require the California court to apply state contract law to the plea bargain claim?

2. If so, may the federal court order habeas corpus relief based on its own view that state contract law required the state court to ignore the prisoner's understanding of the bargain?

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PETITIONER'S REPLY MEMORANDUM

1. The clearly established federal law governing plea agreements, for the purposes of federal habeas corpus review under 28 U.S.C. 2254(d)(1), is that due process requires a defendant to enter his plea in a "knowing," "voluntary and intelligent manner." See *Brady* v. *United States*, 397 U.S. 742, 748 (1970); see also *Mabry* v. *Johnson*, 467 U.S. 504, 509 (1984); *Santobello* v. *New York*, 404 U.S. 257, 261 (1971). Although a defendant has a right to enforce a promise made to him as part of his plea agreement when that agreement is breached, this Court has never articulated a specific method for evaluating whether a breach of a plea agreement has occurred. *Santobello* v. *New York*, 404 U.S. at 257-67; see *Smith* v. *Stegall*, 385 F.3d 993, 999 (6th Cir. 2004); *Innes* v. *Dalsheim*, 864 F.3d 974, 978 (2nd Cir. 1988). In fact, this Court has held that a federal court sitting in habeas jurisdiction must proceed "without second guessing [a state's] finding of a breach" and is without "license to substitute a federal interpretation of the terms of a plea agreement for a reasonable state interpretation."

Ricketts v. *Adamson*, 483 U.S. 1, 5 n.3 (1987). This Court has also repeatedly held that a federal habeas court may not grant a prisoner relief on the basis of a perceived state law error. *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

In the instant case, the en banc panel of the Ninth Circuit ignored the controlling, clearly established federal law governing plea agreements, and violated the command of *Estelle v. McGuire* by holding that the state courts had a duty under the federal Constitution to determine whether respondent's plea agreement complied with California contract law. Pet. For Cert. A9-A10. The Ninth Circuit then substituted, in direct contravention of this Court's precedent, "a federal interpretation of the terms of a plea agreement for a reasonable state interpretation." *Ricketts* v. *Adamson*, 483 U.S. at 5 n.3. The Ninth Circuit did so without ever concluding that respondent did not enter his plea in a voluntary, knowing, or intelligent manner. Pet. for Cert. A1-A17.

In his Opposition, respondent contends that the Ninth Circuit's holding in the instant case was entirely proper and his analysis simply echoes that of the Ninth Circuit's opinion. He reiterates the Ninth Circuit's errors and declines to come to grips with the Questions Presented. Opp. 14-18. His argument reduces itself to the assertion that the California courts violated the federal Constitution by failing to follow their own process for evaluating a claim of a breach of the plea agreement. Yet he fails to identify any clearly established federal law which required the state court to confine its review of his claim to abstract considerations of the paper record as if it were construing a commercial contract. On the contrary, the state courts were entitled, and in fact required, to determine what respondent understood his plea agreement to mean in order to assess whether he entered the plea in a knowing and voluntary manner. *Brady* v. *United States*, 397 U.S. at 748; *Mabry* v. *Johnson*, 467 U.S. at 509; *Santobello* v. *New York*, 404 U.S. at 261.

In this case, the state superior court concluded that

respondent "well knew" that his plea agreement required an indeterminate term of fifteen years to life. Pet. for Cert. H1-H3. The Ninth Circuit erred in substituting a review of the process used by the state court for a review of the result reached in the state court, and the Ninth Circuit's conclusion that the reasonableness of the state court's determination regarding respondent's state of mind "is wholly irrelevant" is indefensible in light of the existing precedent of this Court. Pet. for Cert. A12. Nothing in this Court's opinion in *Ricketts*, or in any other case of this Court, supports the Ninth Circuit's conclusion in the instant case that as a matter of "clearly established federal law" under section 2254(d)(1), a state court must construe a plea agreement according to a particular set of state-law principles identified by the federal court. And no case before this one has held that a federal court may reinterpret a state court's reasonable construction of a plea agreement to determine whether a breach has occurred, rather than confining itself to the relevant constitutional determination of whether a plea was entered in a knowing, voluntary, and intelligent manner.

Respondent's defense of the Ninth Circuit opinion relies on a single case, *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), to assert that California created a liberty interest in the process by which it evaluates plea agreements. Opp. at 16, 19. *Hicks* is entirely inapposite. In *Hicks*, this Court held a state law guaranteeing a criminal defendant certain procedural rights at a sentencing hearing, even if not constitutionally required, may give rise to a liberty interest protected from arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment. *Hicks*, 447 U.S. at 346. The constitutional requirements controlling plea agreements, unlike the procedural rights at issue in *Hicks*, were already clearly established matters of federal law, and governed by the requirement that such agreements must be entered in a knowing, voluntary, and intelligent manner. This is the standard adhered to by the state superior court in this case, but it is a standard that the en banc panel of the Ninth Circuit

wholly ignored. Pet. for Cert. A2-A17, H1-H3. Moreover, respondent never alleged a *Hicks* violation in the California Supreme Court, in the district court, or in the Ninth Circuit, and the Ninth Circuit did not rely upon *Hicks* in any manner in its Opinion. (Pet. for Cert. at A1-A17.) Thus, not only is respondent's reference to *Hicks* misguided, but the application of *Hicks* to respondent's claim would render the claim unexhausted. 28 U.S.C. § 2254(b); *Picard* v. *Connor*, 404 U.S. 270, 275 (1971).

2. Even assuming that *Ricketts* permits a federal court to conduct a review of a state court's determination of breach for reasonableness, the state courts' rejection of respondent's claim was eminently reasonable and that determination was entitled to deference. The Ninth Circuit did "not explain the nature of the deference it purport[ed] to afford the state courts, and one is unable to detect any such deference in the approach" taken by the Ninth Circuit. *Ricketts* v. *Adamson*, 483 U.S. at 5 n.3.

Respondent filed a state habeas petition in the Ventura County Superior Court, through counsel, alleging *both* that he had been misadvised during the plea hearing and that he understood his plea agreement to require that he serve no more than a determinate term of fifteen years in state prison. The Superior Court reviewed the petition filed by respondent and his supporting exhibits: the felony complaint, the prosecutor's offer letter, the felony disposition form, and the reporter's transcripts of respondent's plea and sentencing hearings. Pet. for Cert. H1-P3.[1/] The superior court ordered the district attorney to file a

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1. Respondent correctly notes that the original cover sheet of the reporter's transcript of his sentencing proceeding in state court erroneously provides that the hearing occurred on March 1, 1987, rather than on the correct date, March 1, 1998. Opp. 12 n5. Petitioner reproduced the cover sheet with the erroneous date in the Appendix to the Petition for Certiorari. Pet. for Cert. K1. Petitioner's Index to the Appendix also mislabeled this exhibit as a transcript of the plea proceedings rather than the transcript of the sentencing proceedings.

return. The district attorney's return included a declaration of the prosecutor, Donald Glynn, denying that the People had ever offered respondent anything other than an indeterminate term of fifteen years to life under the plea agreement. Moreover, the prosecutor attached respondent's testimony given during the guilt phase of the Fauber trial, three days after the entrance of the plea, in which respondent testified that he understood his plea agreement to require a term of "15 years to life." Pet. for Cert. J1-J6. The superior court then directed respondent to file a traverse, and told respondent that it was specifically concerned with his testimony during the guilt phase of the Fauber trial. Pet. for Cert. I1. Respondent filed a traverse, but presented no additional evidence in superior court and did not address the superior court's concern regarding his testimony during the Fauber hearing. The superior court denied habeas relief in a written opinion, finding that "the advisement was that the sentence would be 15 years to life as provided by law, and that the [respondent] well knew this." Pet. for Cert. H1-H3, I1, J1-J6. Importantly, in denying relief the superior court cited to *In re Moser*, a case that specifically discusses the "distinction between a mere misadvisement with regard to the consequences of a guilty plea and a violation of a plea agreement." *In re Moser*, 6 Cal.4th 342, 354-355, 24 Cal. 4th 2d 723 (1993).

Respondent errs in suggesting that the superior court did not apply California's own contract law to his claim. Opp. 17-18. Assuming a state law contract analysis was required by clearly established federal law, the superior court had no duty to expressly state that it was engaging in a contract analysis to comply with 28 U.S.C. § 2254(d)(1). *See Early* v. *Packer*, 537 U.S. 3, 8 (2002) (a state court need not provide a "formulary statement" on a particular issue where "the fair import" of its holding its evident from its opinion); *see also Bell* v. *Cone*, 543 U.S. 447, 455 (2005). Nevertheless, the state superior court's citation to *In re Moser* demonstrates that it applied the relevant state law governing violations of plea agreement to respondent's case. Pet. for Cert. H3. Moreover, the superior court's analysis

itself demonstrates that it applied the relevant state law to respondent's case. The superior court looked to the competing provisions regarding respondent's sentence contained in the felony disposition statement and in the reporter's transcript of the plea proceedings, then turned to the extrinsic evidence of respondent's testimony during the guilt phase of the Fauber trial, in which respondent testified that he understood his plea agreement to require a term of fifteen years to life, to resolve the existing ambiguity. The superior court's act of looking to extrinsic evidence to resolve an ambiguity in the agreement was entirely proper and reasonable under California state law, as respondent's subsequent conduct in testifying that he understood his plea agreement to require a prison term of fifteen years to life helped resolve any ambiguity attending to the agreement. See *People* v. *Shelton*, 37 Cal. 4th 759, 767, 37 Cal. Rptr. 3d 354 (2006); *Morey* v. *Vannucci*, 64 Cal. App. 4th 904, 912, 75 Cal. Rptr. 573 (1998). Respondent does not dispute than an ambiguity existed, but he simply omits, as did the Ninth Circuit, the provision of California law providing that a court must look to extrinsic evidence of subsequent conduct to resolve an ambiguous provision of a plea agreement or contract. Opp. 19-21. On this basis, too, it cannot be said that the state superior court's rejection of respondent's claim regarding his plea agreement was contrary to, or constituted an objectively unreasonable application of, clearly established federal law. 28 § 2254(d)(1).

3. Respondent asserts that his testimony during cross-examination of the penalty phase of the Fauber trial, in which he responded to a question regarding when he expected to be released or paroled from prison by stating, "seven and a half years," "reflected his understanding that he would receive a maximum sentence of 15 years in custody," and he further complains that the prosecutor, Mr. Glynn, had a duty to disabuse him of this belief. Opp. 11, 25; see Pet. for Cert. L2. However, respondent's expectation that he would be paroled in

seven and a half years was consistent with a reasonable understanding of parole eligibility for second degree murder, and the required indeterminate term of fifteen years to life, under California law at the time of respondent's sentence. *In re Oluwa*, 207 Cal.App.3d 439, 255 Cal.Rptr. 35 (1989). *Oluwa*, decided one year *after* respondent was sentenced, clarified that a defendant sentenced to an indeterminate term of fifteen years to life for second degree murder would be eligible for parole after ten, rather than seven and one-half, years of custody. *Id.* at 442-47. Prior to *Oluwa*, there was great confusion under state law with respect to whether a defendant sentenced to an indeterminate term of fifteen years to life for second degree murder would be eligible for parole after of seven and a half, or ten, years. *Id.* at 443; see *In re Jovan B.*, 6 Cal.4th 801, 816 n. 10, 25 Cal.Rptr.2d 428 (1993) [discussing impact of *Oluwa*]. Because California law regarding the minimum parole eligibility of defendants convicted of second degree murder was in flux at the time of respondent's testimony at the Fauber trial and his subsequent sentencing hearing, it cannot be said that Mr. Glynn had any to duty to "disabuse" respondent of any particular belief regarding parole eligibility at the time. Opp. 11-12, 25; see Pet. for Cert. C21-C22.

4. Respondent appears to suggest that Petitioner had some duty to develop the factual record in state court on his behalf. Opp. 25-26. Any failure on Respondent's part to develop his own factual record in state court is solely attributable to respondent and his counsel at the time. Had respondent wished to present additional evidence to the superior court, he had every opportunity to do so as the superior court invited respondent to produce additional evidence prior to respondent's filing of the traverse. Pet. for Cert. 11. Respondent's failure to take the superior court up on its invitation demonstrates that he was content to rely on the state of the record before the superior court. See *Holland* v. *Jackson*, 542 U.S. 649, 652-653 (2000); *Williams* v. *Taylor*, 529 U.S. 420, 437 (2000).

5. Respondent relies extensively on evidence presented during the federal evidentiary hearing in arguing the propriety of the Ninth Circuit's judgment in this case and he has attached selected excerpts from that hearing to his Opposition. However, the district court erred in conducting an evidentiary hearing in this case as it never even attempted to determine the reasonableness of the state courts' findings "in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d)(2); *Miller-el* v. *Cockrell*, 537 U.S. 322, 340 (2003); *Keeney* v. *Tamayo-Reyes*, 504 U.S. 1, 9 (1992); see Pet. for Cert. C15-C19, D32-D33. Recognizing this fact, the en banc panel of the Ninth Circuit *did not rely* on the evidence presented during the federal evidentiary hearing in affirming the district court's grant of habeas relief to respondent. Pet. for Cert. A8-A9 ("We affirm, although our analysis differs from the district court's in some respects."). Instead, the Ninth Circuit focused solely on the evidence presented in state court, and concluded, based on this evidence alone, that respondent was entitled to relief. Pet. for Cert. A13 n.8. Thus, respondent's Opposition errs in focusing on evidence which was wholly irrelevant to the Ninth Circuit's conclusion that relief should be granted.

6. Respondent asserts that the "handwritten original" of the felony disposition form "proves that during the change of plea hearing . . . the prosecutor added certain handwritten portions to the agreement, initialed those additions, and signed the bottom of the amended agreement." Opp. at 8-9; see Pet. for Cert. N5 (last paragraph). Respondent further alleges that he was not shown the portion of the statement at issue prior to entering his plea. Opp. at 8-9. The original of the felony disposition form, which includes a portion written in the hand of the prosecutor, has never been introduced during any habeas corpus proceeding in state or federal court. Respondent appears to refer to a copy of the original, which has been presented to every level of the state and federal courts in these proceedings. Pet. for Cert. N5-N9. Although the district court made a factual

finding following the federal evidentiary hearing that certain language in the felony disposition statement was added to the document by the prosecutor after the document was signed by respondent, nothing in the document itself, whether the original or a copy, supports this allegation. Opp. 8-9; see Pet. for Cert. D7 n5. The reporter's transcript of the plea proceedings demonstrates that respondent was indeed shown the document prior to entering his plea. Pet. for Cert. M7. More importantly, the district court's finding on this issue, stemming from the improvidently granted federal evidentiary hearing, was not relied upon by the Ninth Circuit in granting habeas relief to respondent. Pet. for Cert. A13 n.8.

7. Respondent devotes a large portion of his Opposition to a section entitled "Concluding Remarks." Opp. 22-26. The remarks contained therein, and similar remarks appearing elsewhere throughout the Opposition, appear more relevant to an application for parole than to opposing the specific legal claims contained in the Petition for Writ of Certiorari. See Opp. 2, 13 n.7, 22-26. Respondent also sets forth a plethora of multiple-hearsay statements, attributing various extrajudicial statements not contained in the record to the attorneys, investigators, parole agents, and judges involved in these proceedings. Opp. 13 n. 7, 22-26. Respondent's concluding remarks constitute an attempt to garner sympathy by injecting into the case a host of irrelevant issues centering on his custodial status, which are unsupported by the record and not properly before this Court. *See Witters* v. *Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 487 (1986) (a question presented must be decided on "facts as they appear in the record"); *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) (matters outside of the record will not be considered). Respondent errs in asserting that "everyone . . . completely believes he has earned his freedom - that he should be paroled." Opp. 23. The California Board of Parole Hearings, the appropriate executive agency governing parole in the State of

California, has never had the opportunity to decide the propriety of respondent's release, and it is this agency which must "believe" that respondent "has earned his freedom" and that he "should be paroled." Opp. 23. Respondent's physical custodial status is not directly at issue in these proceedings, and the propriety of his continued release should be left to the California Board of Parole Hearings. Respondent's repeated references to unsubstantiated hearsay and matters outside the record of the instant case should be ignored.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: March 15, 2007

Respectfully submitted,

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